78-1285

No.



In the
# Supreme Court of the United States
October Term, 1978

MARK CHARLES FLOYD,
*Appellant,*

*vs.*

STATE OF ARIZONA
*Appellee.*

Appeal from the
Supreme Court of Arizona

## JURISDICTIONAL STATEMENT

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The Scheffer Press, Inc.—(312) 263-6850

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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MARK CHARLES FLOYD,

*Appellant,*

*vs.*

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*Appellee.*

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Appeal from the
Supreme Court of Arizona

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The Supreme Court of Arizona, on October 24, 1978, denied Appellant's Petition for Review of a criminal conviction for unlawful possession of narcotic drugs, to wit: Hashish, in violation of Arizona Revised Statutes 1976, Section 36-1002. A copy of that judgment, which was not reported, is included in the Appendix hereto.

The Arizona Court of Appeals, Division Two, had upheld the validity of the classification of hashish as a narcotic drug within the context of Arizona's Uniform Nar-

cotic Drug Act, Arizona Revised Statutes 1976, Section 36-1001 et seq. The Court of Appeals held, *inter alia,* that the statutory classification of hashish as a narcotic, conviction for possession of which carries a more severe sentence than for possession of marijuana, did not result in a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. A copy of this opinion is also included in the Appendix hereto, and is reported at ..... Ariz. ....., 586 P.2d 203 (1978). Appellant's motion for rehearing was denied on October 11, 1978. A copy of the Mandate of the Court of Appeals is included in the Appendix hereto.

## JURISDICTION

The appeal herein is from a final judgment of the Supreme Court of Arizona denying Appellant's Petition for Review of a criminal conviction for unlawful possession of narcotic drugs in violation of Arizona Revised Statutes, Section 36-1002. The decisions of the Arizona Supreme Court and the Court of Appeals of State of Arizona upheld the constitutionality of Section 36-1002. The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to Title 28, United States Code, Section 1257(2).

The final judgment was entered by the Supreme Court of Arizona on October 24, 1978. A timely Notice of Appeal, a copy of which is included in the Appendix hereto, was filed on January 22, 1979, in the State of Arizona Court of Appeals, Division Two, where the Record of Proceedings is on file.

The statutes involved herein are as follows: Arizona Revised Statutes 1976, Sections 36-1001(13), 36-1002, 36-1002.02, 36-1002.05, and 36-1002.07. The relevant portions of these statutes are set out in the Appendix hereto.

## QUESTION PRESENTED

Did the Courts below improperly hold that the classification of hashish as a narcotic drug, distinct from marijuana, within the Arizona Uniform Narcotic Drug Act, did not result in a violation of Appellant's Equal Protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution?

## STATEMENT OF THE CASE

Appellant was indicted by a Pima County Arizona Grand Jury and convicted by a jury of the offense of possession of a narcotic drug in violation of Arizona Revised Statutes 1976, Section 36-1002. Significantly, Appellant previously had been convicted of a narcotics violation, which, pursuant to Section 36-1002, required the trial court to impose an enhanced penalty.

Prior to trial, Appellant, by his counsel, filed a Motion to Dismiss the indictment alleging that the case of *State* v. *Bollander*, 110 Ariz. 84 (1973) improperly classified hashish as a narcotic drug within the meaning of Arizona Revised Statutes 1976, Sections 36-1002 and 36-1002.02, in that hashish is a derivative of marijuana and contains the same chemical compound as marijuana does, i.e., tetrahydrocannabinol (T.H.C.), which produces the so-called "high," for which both hashish and marijuana are illicitly used. The motion to dismiss stated in substance that since marijuana and hashish are identical in all significant respects except for physical appearance, the statutory requirement of imposition of a greater sentence for hashish offenses, Arizona Revised Statutes 1976, Section 36-1002 and 36-1002.02, than for marijuana offenses, Arizona Revised Statutes 1976, Sections 1002.05 and 36-1002.07, is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The trial court denied Appellant's motion to dismiss the indictment, and, following the jury's verdict of guilty as to the offense of possession of a narcotic drug, imposed a sentence of incarceration for a period of not less than five years nor more than five years and one day.

In the State of Arizona Court of Appeals, Appellant again advanced the argument that the classification of hashish as a narcotic drug violates the Equal Protection Clause. However, the Court of Appeals affirmed the trial court's ruling as to this issue, holding that the classification is reasonable and constitutional. The Supreme Court of Arizona, subsequently denied Appellant's Petition for Review.

## FEDERAL QUESTIONS ARE SUBSTANTIAL

The disparate sentencing provisions for narcotics offenses and marijuana offenses poses a substantial issue.

Appellant was sentenced on his conviction for possession pursuant to Arizona Revised Statutes 1976, Section 36-1002(B) which provides for a mandatory sentence of imprisonment for a period of not less than five nor more than twenty years, with no provision for probation or parole, where there had been a prior felony conviction. Had hashish been categorized as a form of marijuana, Appellant would have been subject to the sentencing provisions of Arizona Revised Statutes 1976, Section 36-1002.05 (B), which allows for a prison sentence of from two to twenty years, but does *not* preclude the imposition of a sentence of probation. This disparity in sentencing provisions, due to the unreasonable classification of hashish as a narcotic drug, has resulted in substantial injustice to Appellant.

Appellant introduced expert testimony at the hearing on the motion to dismiss the indictment, which demonstrated that tetrahydrocannabinol (T.H.C.) is the sole active chemical found in both marijuana and hashish (R.P. 10/6/77 at 12-13); that hashish is the resin secreted by the marijuana plant (R.P. 10/6/77 at 12-13); that T.H.C. is found in every item enumerated in Section 36-1001(13) under the heading "Cannabis" (R.P. 10/6/77 at 19); that portions of the marijuana plant may contain greater concentrations of T.H.C. than found in hashish (R.P. 10/6/77 at 29); and finally that "cannabis" and "marijuana" are one and the same (R.P. 10/6/77 at 12). The conclusion to be drawn from this testimony is that marijuana and hashish are identical substances in that they both contain T.H.C., but merely differ in physical appearance.

Finally, it would appear that the Arizona legislature and courts would have a legitimate and rational concern with the distribution and use of marijuana and narcotics. However, this concern should reasonably and realistically extend to the presence of those chemical substances which are abused or dangerous, and not to the physical form by which those chemical substances are distributed or used.

There can be no doubt that the federal question presented herein is substantial, inasmuch as it affects the Equal Protection rights of this Appellant in this cause. The Constitutional violation to Appellant has resulted in his incarceration for a period of at least five years as a result of the arbitrary classification of hashish as a narcotic drug.

## CONCLUSION

Appellant submits that this Honorable Court should take jurisdiction of this Appeal.

Respectfully submitted,

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*Of Counsel.*

## APPENDIX

October 25, 1978

STATE OF ARIZONA,

*Appellee,*

*vs.*

MARK CHARLES FLOYD,

*Appellant.*

Supreme Court
No. 4428-PR
Court of Appeals
Nos. 2 CA-CR 1334 & 2 CA-CR 1335-2
(Consolidated)
Pima County
Nos. A-31456 & 28589
(Consolidated)

The following action was taken by the Supreme Court of the State of Arizona on October 24, 1978 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 25th Day of October, 1978.

CLIFFORD H. WARD, Clerk
By BECKY SANCHEZ
Deputy Clerk

TO: Hon. John A. LaSota, Jr., Attorney General, 200 State Capitol Building, Phoenix, Arizona 85007

Philip G. Urry, Assistant Attorney General, 1005 Pioneer Plaza Building, 100 North Stone Avenue, Tucson, Arizona 85701

Walter B. Nash III, Esq., McDonald & Nash, Suite 1210, Home Federal Tower, 32 North Stone Avenue, Tucson, Arizona 85701

Stephen D. Neely, Pima County Attorney, 131 West Congress, Tucson, Arizona 85701

Hon. Lillian S. Fisher, Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

September 14, 1978

Clerk Court of Appeals

FILED

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

THE STATE OF ARIZONA,

*Appellee,*

*vs.*

MARK CHARLES FLOYD,

*Appellant.*

2 CA-CR 1334
2 CA-CR 1335-2
(Consolidated)
(Pima County Superior Court
Cause Nos. A-31456 and A-28589)
(Consolidated)

The Honorable John A. LaSota, Jr.,
The Attorney General, State of
Arizona, Phoenix; by Philip G. Urry,
Assistant Attorney General, Tucson,
*Attorneys for Appellee.*

McDonald & Nash, Tucson; by
Walter B. Nash III, Esq.,
*Attorneys for Appellant.*

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Opinion.

IT IS ORDERED that the Opinion be filed by the Clerk, and, under the Rules of Criminal Procedure, Rule 31.18, Arizona Revised Statutes, fifteen days are allowed after service of the decision or order to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this Order, together with a copy of the Opinion, be sent to each party appearing or the attorney for such party and to The Honorable Lillian S. Fisher, Judge.

Dated: September 14, 1978.

JAWES L. RICHMOND,
*Chief Judge.*

Copies mailed as directed this
14 day of September, 1978.
ELIZABETH URWIN FRITZ, *Clerk.*

FILED

September 14, 1978
Clerk Court of Appeals

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE AF ARIZONA,

*Appellee,*

*vs.*

MARK CHARLES FLOYD,

*Appellant.*

2 CA-CR 1334
2 CA-CR 1335-2
(Consolidated)

## OPINION

Appeal from the Superior Court of Pima County
Honorable LILLIAN S. FISHER, *Judge*
Cause No. A-31456 and A-28589
(Consolidated)

## AFFIRMED

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The Attorney General
by Philip G. Urry
Assistant Attorney General
*Attorneys for Appellee* Tucson

McDonald & Nash
by Walter B. Nash III
*Attorneys for Appellant* Tucson

JAMES L. RICHMOND, *Chief Judge*

Mark C. Floyd appeals from his conviction of unlawful possession of a narcotic drug, hashish, and from the resulting revocation of probation and sentence in an earlier case. He questions the classification of hashish as a narcotic drug, failure to suppress the hashish as the product of an illegal search, certain evidentiary rulings, the prosecutor's jury argument, and the sufficiency of the evidence. We will address his contentions in that order.

Recognizing that classification of hashish as a narcotic drug under A.R.S. §36-1001 was approved in *State* v. *Bollander,* 110 Ariz. 84, 515 P.2d 329 (1973), appellant attacks the supreme court's decision in that case as based on inadequate facts. The holding in *Bollander,* however, is limited to a construction of the statute. His further argument that *Bollander* has not stood the test of the intervening five years is refuted by *State* v. *Zeiter,* ..... Ariz. ....., 580 P.2d 331 (1978), decided while this appeal was pending.

Alternatively, appellant contends that the more severe treatment of hashish under A.R.S. §36-1002.02 than of another form of cannabis (marijuana) under §36-1002.07

denies him equal protection of the laws. We find no such violation of his constitutional rights.

Acts of the legislature are presumed constitutional and "when there is a reasonable, even though debatable, basis for the enactment of a statute, we will uphold the act unless it is clearly unconstitutional." *State* v. *Murphy,* 117 Ariz. 57, 61, 570 P.2d 1070, 1074 (1977). Substantial portions of the suppression hearing and appellant's briefs are dedicated to expert testimony establishing the absence of any pharmocological distinction between hashish and marijuana. As noted, however, in *State* v. *Wadsworth,* 109 Ariz. 59, 505 P.2d 230 (1973), the legislature, in adopting the Uniform Narcotic Drug Act, A.R.S. §§36-1001, et seq., intended to "proscribe the use of marijuana, not to scientifically categorize it according to its composition and effect." 109 Ariz. at 63. Although the court in *Wadsworth* was faced with the more readily apparent distinction between marijuana and "dangerous drugs" such as "speed" and "LSD," the rationale is appropriate here. The applicable premise is that the legislature may treat two substances differently on some basis other than their chemical composition and effect. The greater concentration in hashish of the psychoactive agent Delta 9 tetahydrocannibinol may render it more susceptible to serious and extensive abuse than bulkier marijuana, easier to conceal, hence more difficult to detect and seize. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed. 2d 393, 399 (1961).

We also reject appellant's contention that the search of his motorcycle was not a valid inventory search. Appellant had collided with another vehicle at a Tucson intersection. His motorcycle was lying on its side, a few feet from him, and he was unconscious when Sergeant Weeks of the Tucson Police Department arrived to supervise the accident investigation. Shortly before a private towing company was to take the motorcycle to its storage yard, Weeks removed a small package, shaped like a book, which was strapped to the rear portion of the motorcycle seat by two

elastic cords. In the package he found a brown substance, wrapped in plastic, which he suspected to be contraband. Chemical analysis later revealed the substance to be hashish.

Police officers may make an inventory search of a vehicle in their custody. *South Dakota* v. *Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Two purposes of the inventory search which were recognized as valid in *Opperman* are the protection of the owner's property and "the protection of the police against claims or disputes over lost or stolen property." 428 U.S. at 369. In the case before us, the officers had legal custody of the vehicle, *see* A.R.S. §28-872(c)(2), and in accordance with standard police procedure searched the motorcycle for valuables.

Appellant argues that the purposes of the inventory search could have been served without opening the paper bag containing the hashish. Our supreme court, however, in upholding the seizure of the contents of a closed shaving satchel, has said that "[i]f one of the reasons for conducting the inventory is to safeguard valuables which might be present, it is illogical to prohibit law enforcement officials from searching those areas wherein valuables are most likely to be placed." In Re One Econoline, etc., 109 Ariz. 433, 436, 511 P.2d 168, 171 (1973). *See also Opperman*, supra, at 386-87, n. 4 (Justice Marshall, dissenting). The hashish was legally seized incident to an inventory search. Appellant's reliance on *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), which in no way deals with the inventory search of a vehicle, is misplaced. *See State* v. *Walker*, ..... Ariz. ....., 579 P.2d 1091 (1978).

Over appropriate objections, the trial court admitted into evidence a copy of the motorcycle registration, although it had not been disclosed as required by rule 15.1 (a)(4), 17 A.R.S. Rules of Criminal Procedure. Imposition of sanctions under rule 15.7(a) for failure to disclose is within the sound discretion of the trial court. Absent a showing of prejudice, this court will not find an abuse of discretion. *State* v. *Clark*, 112 Ariz. 493, 543 P.2d 1122 (1975). In light of the grand jury transcript, appellant

could reasonably have expected proof at trial as to the ownership of the motorcycle. Moreover, he made no motion for a continuance to remedy any possible prejudice. *Cf. State* v. *Castaneda,* 111 Ariz. 264, 528 P.2d 608 (1974). We find no abuse of discretion in the trial court's failure to exclude the registration. *Cf. State* v. *Gambrell,* 116 Ariz. 188, 568 P.2d 1086 (App. 1977).

Appellant also urges that the registration lacked requisite authentication and that its admission violated the rule against hearsay. The certified copy of the registration was signed by its custodian, whose signature was in turn verified by the statement under seal of the assistant director of the Department of Transportation, Motor Vehicle Division. The copy was therefore within the self-authentication provisions of rule 902(2), Arizona Rules of Evidence, relating to domestic public documents not under seal.

The registration was properly admitted as an exception to the rule against hearsay under rule 803(8), which provides:

> "(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report. . . ."

The trial court noted "an aura . . . of trustworthiness," and took judicial notice of A.R.S. §28-104(B), which imposes a duty to register vehicles. The document thus satisfied the requirements of rule 803(8).

Appellant's contention that there was inadequate foundation for the procedure used to test the hashish is without merit. He cites no cases, and we have found no authority supporting the proposition that an expert chemist in giving his opinion on the identity of a substance must first establish the purity and reliability of the chemical agents used in his analysis.

Appellant next argues that portions of the prosecutor's closing argument denied him his right to a fair trial. He initially contends that the prosecutor improperly commented on his failure to testify. The prosecutor stated:

> "[Defense counsel] has the power of subpoena, as does the State. He can put on witnesses. He can put on witnesses who say despite the fact that Agent Petropoulos says in his mind it is held for purposes of sale that it would be held for another use. But there is no testimony to that effect."

Also:

> "Along the same line again I mentioned the power of subpoena. [Defense counsel] has the power of subpoena. If there were another person, that person could come in and say it is not Mr. Floyd."

Only comments on the failure of the defendant to testify personally are objectionable. *State* v. *Still*, ..... Ariz. ....., ..... P.2d ..... (No. 4096-PR, filed July 18, 1978). The target of the prosecutor's first comment was appellant's failure to subpoena and call his own expert. *See Ignacio* v. *People of Territory of Guam*, 413 F.2d 513 (9th Cir. 1969). The second comment was clearly a response to the suggestion by appellant's counsel that some unknown person may have been riding with appellant at the time of the accident.[1] It is thus apparent that neither comment was directed to the defendant's failure to testify personally.

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[1] In his closing argument, appellant's counsel stated:
"I don't know if he was driving alone. I don't know if he was driving with a passenger. They just don't know. You didn't hear any testimony about that one way or another. I anticipate what Mr. Ross might say. He may say, you remember I asked one of those police officers who testified, did anybody come up running to you and say I was a passenger? No, they didn't that is true, no one did. I am not sure what that proves. I am not sure if there was a passenger on that motorcycle who knew what was in the bag, who was aware of the kind of severe criminal penalties we are talking about."

Appellant alleges that the prosecutor impermissibly interjected his own opinion as to guilt when he said that "[appellant] is the party who was guilty, not some imaginary person." Again, the remarks were made in response to appellant's attorney's suggestion that some other person placed the hashish on the motorcycle. Although the prosecutor should have avoided referring to appellant as "the party who was guilty," given the context and isolated nature of the remark, it is not so grievous as to require reversal.

Also, appellant charges that the prosecutor injected his opinion as to legislative intent as well as guilt by stating that "[w]hen the Legislature drafts statutes, like they drafted this one, their intent is not to get innocent people convicted." We do not believe the remark was sufficiently pointed or prejudicial to constitute reversible error.

Ultimately, citing *State* v. *Filipov,* 118 Ariz. 319, 576 P.2d 507 (App. 1978), and *State* v. *Woodward,* 21 Ariz. App. 133, 516 P.2d 589 (1973), appellant urges that the cumulative effect of the prosecutor's statements requires reversal if the statements individually do not. We find no impropriety approaching the level in the cited cases.

Appellant's last argument is that possession of the hashish was not supported by the evidence. The crime of possession of narcotics requires physical or constructive possession with actual knowledge of the narcotic substance. *Carroll* v. *State,* 90 Ariz. 411, 368 P.2d 649 (1962). As the supreme court said in *State* v. *Villavicencio,* 108 Ariz. 518, 520, 502 P.2d 1337 (1972):

> "Constructive possession is generally applied to those circumstances where the drug is not found on the person of the defendant nor in his presence, but is found in a place under his dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the narcotics. Exclusive control of the place in which the narcotics are found is not necessary."

Constructive possession may be proved by circumstantial evidence. *State* v. *Donovan,* 116 Ariz. 209, 568 P.2d 1107 (App. 1977). In this case, the motorcycle on which the marijuana wsa found was owned and operated by the appellant. The package containing the hashish was located so that it would have been nearly impossible for appellant to have mounted the motorcycle without noticing it. Consequently, it was not improper for the jury to infer knowing possession from the fact that the contraband was found on a vehicle owned and driven by appellant. *See United States* v. *Castillo-Burgos,* 501 F.2d 217 (9th Cir. 1974); *State* v. *Harris,* 9 Ariz. App. 288, 451 P.2d 646 (1969). Appellant relies principally on *United States* v. *Martinez,* 514 F.2d 334 (9th Cir. 1975), and *State* v. *Miramon,* 27 Ariz. App. 451, 555 P.2d 1139 (1976). The rationale of those cases is not pertinent where the owner-driver is the sole occupant of the vehicle. In the case before us, there is no evidence that someone other than appellant was on the motorcycle at the time of the accident. The evidence thus was more than sufficient to support a finding of possession.

The judgments and sentences are affirmed.

JAMES L. RICHMOND, *Chief Judge*

CONCURRING:

LAWRENCE HOWARD, *Judge* JAMES D. HATHAWAY, *Judge*

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

*Appellee,*

*vs.*

MARK CHARLES FLOYD,

*Appellant.*

# MANDATE

2 CA-CR 1334 & 2 CA-CR 1335
(Consolidated)
(Pima County Superior Court
Cause Nos. A-31456 & A-28589)
(Consolidated)

The Honorable John A. LaSota, Jr., The Attorney General, State of Arizona, Phoenix, Arizona; by Philip G. Urry, Assistant Attorney General, Tucson, Arizona,

*Attorneys for Appellee.*

Walter B. Nash III, Esq., Law Offices, McDonald & Nash, Tucson, Arizona,

*Attorney for Appellant.*

TO: The Honorable Superior Court of the State of Arizona in and for the County of Pima in relation to Pima County Cause Nos. A-31456 and A-28589.

The above-entitled matter was duly submitted to the Court of Appeals, Division Two, for decision, and, on *September 14, 1978*, this Court did render its *Opinion;* Motion for Rehearing was filed *September 20, 1978;* Response to Motion for Rehearing was filed *September 29, 1978;* Supplement to Motion for Rehearing was filed *October 3, 1978;* and, on *October 11, 1978,* by order of this Court, the Motion for Rehearing was *Denied.* Petition for Review was filed *October 12, 1978;* and, on *October 24, 1978,* by order of the Arizona Supreme Court, the Petition for Review was *Denied.*

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the *Opinion* of this Court, certified copy of said *Opinion* being attached hereto.

WITNESS, THE HONORABLE JAMES L. RICHMOND, Chief Judge of the Court of Appeals, Division Two, of the State of Arizona, this 13th day of November, 1978.

ELIZABETH URWIN FRITZ
Clerk, Court of Appeals, Div. Two
State of Arizona

Copy to:

Hon. John A. LaSota, Jr., The Attorney General, Phoenix, Arizona; Office of the Attorney General, Tucson, Arizona; Hon. Stephen D. Neely, Pima County Attorney; Walter B. Nash III, Esq., 1210 Home Federal Tower, 32 North Stone Ave., Tucson, Arizona 85701; Hon. Lillian S. Fisher, Judge, Pima County Superior Court; Mrs. Norma M. Felix, Clerk, Pima County Superior Court [Original mandate.]

Pursuant to Rule 19(a), Supreme Court Rules, 17(A) A.R.S., pleadings, minutes and orders will be retained by this Court. Record returned this 13th day of November, 1978; receipt requested.

Reporters' Transcripts—7 volumes (includes Grand Jury plus 1 volume filed directly with this Court being forwarded with return of record); Presentence Report—Part One; Exhibits—1 tan envelope.

Received: .....

Clerk, Pima County Superior Court, by .....

..... Deputy Clerk

RECEIVED
January 22, 1978
Clerk Court of Appeals

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STATE OF ARIZONA,

*Appellee,*

*vs.*

MARK CHARLES FLOYD,

*Appellant.*

Supreme Court
No. 4428-PR
Court of Appeals
Nos. 2 CA-CR 1334 & 2 CA-CR 1335-2
(Consolidated)
Pima County
Nos. A-31456 & 28589
(Consolidated)

## NOTICE OF APPEAL

Notice is hereby given that Mark Charles Floyd, the Defendant above named, hereby appeals to the United States Supreme Court from the judgment of the Supreme Court of Arizona entered in this action on October 24, 1978.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated: January 18, 1978

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*Local Counsel*

Arizona Revised Statutes 1976, Section 36-1001, provides in relevant part:

. . . 13. "Cannabis" includes the following substances under whatever names they may be designated:

(a) Marijuana.

(b) All parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber oil or cake, or the sterilized seed of such plant which is incapable of germination.

(c) The resin extracted from such tops.

(d) Every compound, manufacture, salt, derivative, mixture or preparation of such resin, tetrahydrocannabinol (T.H.C.), or of such tops from which the resin has not been extracted.

Arizona Revised Statutes 1976, Section 36-1002 provides in part:

*Possession of narcotic drugs; punishment*

A. Except as otherwise provided in this article, every person who possess any narcotic drug other than marijuana except upon the written prescription of a physician, osteopath, dentist or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for not less than two years nor more than ten years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years in prison.

B. If such a person has been previously convicted once of any felony offense described in this article, or has been previously convicted once of any offense under the laws

of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than five years nor more than twenty years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison. . . .

Arizona Revised Statutes 1976, Section 36-1002.02 provides as follows:

> *Import and transport of narcotic drugs; sales and traffic in narcotic drugs; penalty; probation or suspension of sentence prohibited.*

A. Except as otherwise provided in this article, every person who transports, imports into this state, sells, furnishes, administers or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any narcotic drug other than marijuana except upon the written prescription of a physician, osteopath, dentist, or veterinarian licensed to practice in this state shall be punished by imprisonment in the state prison from five years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

B. If such a person has been previously convicted once of any felony offense described in this article, or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted

by the defendant, he shall be imprisoned in a state prison from ten years to life, and shall not be eligible for release upon completion of sentence, or on parole or on any other basis until he has served not less than ten years in prison. . . .

Arizona Revised Statutes 1976, Section 36-1002-05, provides in relevant part:

*Growing, processing and possessing marijuana; penalty*

A. Every person who knowingly grows, plants, cultivates, harvests, dries, or processes any marijuana, or any part thereof, or who knowingly possess any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison for not less than one year nor more than ten years but for the first offense the court may impose a fine not exceeding one thousand dollars, imprisonment in the county jail not exceeding one year or both.

B. If such person has been previously convicted once of any felony offense described in this article, or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than twenty years. . . .

Arizona Revised Statutes 1976, Section 36-1002.07, provides in relevant part as follows:

*Imports and transports of marijuana; sales and traffic; penalty*

A. Every person who transports, imports in this state, sells, furnishes, administers or gives away, or offers to

transport, import in this state, sell, furnish, administer, or give away, or attempts to import into this state or transport, import into this state, sell, furnish, administer, ment in the state prison from five years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than three years.

B. If such a person has been previously convicted once of any felony offense described in this article, or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in a state prison from five years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison. . . .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1285

MARK CHARLES FLOYD,

Appellant,

vs.

STATE OF ARIZONA,

Appellee.

Appeal from the
Supreme Court of Arizona

# MOTION TO DISMISS APPEAL

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The Attorney General

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# I N D E X

## TABLE OF CASES AND AUTHORITIES

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## MOTION TO DISMISS APPEAL

Comes now Appellee, the State of Arizona, and moves this Court pursuant to Rule 16 to dismiss the appeal for failure to present a substantial federal question. Reasons therefore are set out in the argument which follows.

## ARGUMENT

### I

### THE STATUTORY SYSTEM OF VARYING PUNISHMENTS FOR DRUG OFFENDERS OF WHICH APPELLANT COMPLAINS RESTS ON A RATIONAL BASIS, SO HIS SENTENCE IS IMMUNE TO CONSTITUTIONAL SEARCH.

Appellant contends that the State of Arizona may not classify hashish as a narcotic, and punish him for its possession accordingly, while marijuana per se is punished less severely. This is clearly incorrect. That the police power of the state is broad enough to encompass the regulation of dangerous drugs has long been recognized by this Court. See, e.g., Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41(1921). Moreover, the overwhelming weight of judicial authority holds that marijuana itself may properly be statutorily classified as a narcotic, even though the scientific basis for such classification may be questionable. See Annot., "Drugs

of Vegetable Origin as Narcotics", 50 A.L.R.3d 1164 and Supp. Appellant is therefore forced to argue that there is no significant difference between hashish and marijuana, and hence no legitimate basis for punishing more severely for possession of hashish.

Appellant's argument that there is no real difference between hashish and marijuana is based upon expert testimony that the active element in both is the same, referred to as THC. (Jurisdictional Statement at 8). However, hashish and marijuana do not "merely differ in physical appearance." (Id. at 9). Hashish is the resin obtained from the marijuana plant. (R.P. Oct. 6, 1977 at 12-13, 23, 42, 47-48). It therefore is physically different from marijuana in that it is not composed of the bulky vegetable matter which comprises marijuana. (Id. at 49). Appellant's own expert conceded that although there are wide

variations (because THC is more concentrated in some parts of the marijuana plant than others), hashish usually contains more THC than does marijuana. (Id. at 24). This was also the conclusion of the state's expert (Id. at 52,59), and it is a fact that has been judicially recognized before. The Ninth Circuit noted expert testimony defining hashish as "a form of marihuana which contains a greater portion of the active ingredient THC, than does the normal plant." United States v. Kelly, 527 F.2d 961, 962(1976). For this reason, hashish is generally considerably more potent in its psycho-active effects than ordinary leafy marijuana. (R.P. Oct. 6, 1977 at 25). A typical dose of hashish is only 1/40 of a gram. United States v. Kelly, supra. Instead of requiring an entire cigarette of contraband, as marijuana use does,

in hashish use a "very small line of it on a pin can be drawn down the outside of a cigarette. As that is smoked the oil is volatilized, the THC is inhaled." (R.P. Oct. 6, 1977 at 48).

In sum, hashish is physically much more compact than marijuana, and usually is more potent in its ability to alter the user's mind because it is purer THC. These factors provide sufficient reasons for applying stricter regulation to hashish by way of harsher penalties. Alcohol is the active ingredient in both hard liquor and beer, but its concentration in liquor creates a much higher potential for abuse, so liquor has historically been regulated much more intensely than beer. The same rationale applies here. Moreover, even in its most concentrated form, alcohol is relatively bulky and

easily detected. Hashish, however, is extremely compact, making its regulation, detection, and seizure much more difficult than enforcement of the laws against marijuana. These are clearly legitimate, rational distinctions upon which the heavier penalties for hashish possession could properly be based.

This Court, in upholding New York's innovative approach to drug control, through prescription registration, recently reiterated the view that "[I]ndividual States have broad latitude in experimenting with possible solutions to problems of vital local concern." Whalen v. Roe, ____U.S._____, 97 S.Ct. 869, at 875(1977). The Court then went on to hold that a state's "vital interest in controlling the distribution of dangerous drugs" was enough to make the experiment a "reasonable exercise of New York's broad police powers." Id. at 876. This

necessarily follows from a strong line of cases defining the application of the Equal Protection Clause to legislatively-drawn distinctions.

> "Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious." McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons

totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093(1947); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911)."
McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 808-809(1969).

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause

> merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369, quoted in Morey v. Doud, 354 U.S. 457, 463-464 (1957).

While the precise verbiage varies, these tests all amount to essentially the same thing--if there is a rational basis for the distinction applied, it will be upheld. There clearly is a rational basis for the Arizona legislative scheme which varies the penalty applicable according to the concentration of THC in the contraband. That this is a wholly appropriate approach is demonstrated

by the cases upholding the linking of penalties to the amount of drug mixture possessed. A number of states have enacted statutes creating penalties which are progressively more severe according to the weight of the compound containing illicit drugs possessed by the defendant. Such statutes have sometimes been attacked as violating the Equal Protection Clause because a person possessing, for example, 10 ounces of a compound containing only one ounce of pure heroin would be subject to a harsher penalty than a person possessing two ounces of straight heroin. The statutes have nonetheless been upheld because they rested on a rational basis. See, e.g., People v. Mayberry, 63 Ill.2d 1, 345 N.E.2d 97 (1976); People v. Solarzano, 84 Cal.App.3d, 148 Cal.Rptr. 696(1978); United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974). The Daneff case is especially instructive here.

After quoting this Court's statement in Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937) that "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the state's] determination", the Court of Appeals stated,

> "The State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all violators with the precision of a computer. . . "
> 501 F.2d at 1184.

In other words, a state constitutionally need not tailor its penalties depending upon the purity of the active element in the contraband. Arizona has taken that extra step, a step which, if anything, increases the fairness of the statutory scheme rather than detracting from it. The gravity of the drug problem in Arizona is a matter of common knowledge, and certainly is as much a "problem of vital

local concern"in Arizona as similar problems were in New York. Whalen v. Roe, supra. The Arizona legislature has enacted an enlightened, thoroughly reasonable statutory scheme for dealing with the problem. The statute is inoffensive to the Constitution, and should therefore be upheld.

## CONCLUSION

Appellant has failed to show any basis for his claim that the Arizona drug statutes deny him equal protection of the laws. A substantial federal question being completely lacking, this Court should dismiss the appeal.

Respectfully submitted,

ROBERT K. CORBIN
The Attorney General

WILLIAM J. SCHAFER III
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Criminal Division

Bruce M. Ferg

BRUCE M. FERG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Pima)

BRUCE M. FERG being first duly sworn upon oath, deposes and says:

That two copies of Appellee's Motion to Dismiss Appeal were mailed, first class postage prepaid, this date to:

Arthur M. Berman
120 W. Madison St.
Room 600
Chicago, Illinois 60602

Further affiant sayeth not.

Bruce M. Ferg
BRUCE M. FERG

SUBSCRIBED AND SWORN to before me this 22 day of February, 1979.

Patricia A. Kleen
Notary Public

My Commission Expires:
3/6/81